

Written evidence submitted by Shelter (TFB42)

Shelter helps millions of people every year struggling with bad housing or homelessness through our advice, support and legal services. And we campaign to make sure that, one day, no one will have to turn to us for help.

We're here so no one has to fight bad housing or homelessness on their own.

Summary

- Shelter supports the Tenant Fees Bill and the Government's ongoing commitment to making renting fairer and more affordable. We are very pleased that the Government has held firm on its promise to introduce an outright ban on upfront letting fees, as this will ease the significant financial pressures renters face when moving, whilst making the lettings market more competitive and transparent.
- However, as currently drafted, the Bill still leaves renters open to paying unfair charges by not including sufficient protections around payments in the event of a default. Publishing non-statutory guidance on the use of default fees will not be sufficient to protect renters from unfair charges, and further protections are needed in the legislation to limit what can be charged for and to ensure any charges represent the reasonable loss arising from the default.
- Additional protections are also needed around the use of holding deposits. Landlords and letting agents should be required to set out in writing how they will treat a holding deposit and if not returning a holding deposit, evidence of the grounds they have for doing this. This will make it easier for tenants to challenge if they feel their holding deposit is being withheld unfairly.
- Making these changes will ensure that the Bill has maximum impact for tenants, whilst also benefitting landlords and agents by driving up standards in the lettings industry.
- **Overall, Shelter recommends the Tenant Fees Bill Committee:**
 - 1) **Retains the all-encompassing ban on upfront letting fees**
 - 2) **Ensures there are sufficient protections on the use of "payments in the event of a default"**
 - 3) **Adds in more protections to prevent any confusion or abuse over the returning of holding deposits**
 - 4) **Reconsiders the HCLG Committee's recommendation to cap holding deposits at 5 weeks' rent**

Introduction

1. Shelter welcomes the opportunity to submit written evidence to the Tenant Fees Bill Committee. We have previously submitted [evidence to the HCLG Committee](#) on the draft Bill and produced a [Parliamentary Briefing for MPs](#), setting out our view on the provisions in the updated Bill.
2. This written submission builds on our previous evidence and focuses on the areas which Shelter believes should be a priority for the Bill Committee.

Recommendations to the Committee

Recommendation 1: Retain the all-encompassing ban on upfront letting fees

3. Shelter strongly supports the Government's approach to banning upfront letting fees as this will immediately reduce the cost of moving for private renters. Shelter's most recent private renters survey showed average total moving costs were around £1,400, with those who were charged letting fees paying an average of nearly £250 in fees.¹ By banning these fees (including fees for administration, preparing a tenancy agreement, referencing and inventories) the Bill will remove a key barrier to securing a new tenancy. This will particularly benefit those on low incomes, who struggle most with the upfront costs of moving.
4. An outright ban is the only way to achieve the Government's objective of a fairer, more competitive and more affordable lettings market. The Committee should ensure the ban is not watered down, as exempting any fees risks creating loopholes which will be exploited and will make the ban significantly more difficult to enforce.
5. The importance of a clear and all-encompassing ban is highlighted by evidence from the banning of letting agent fees in Scotland. Even after the ban was clarified, fewer than one-third of Scottish renters clearly understood there was a law banning fees and lingering confusion around the ban impacted on compliance.²

Recommendation 2: Ensure there are sufficient protections on the use of "payments in the event of a default"

6. Shelter accepts the principle that tenants should cover the cost of a default in certain circumstances, both during a tenancy and at the end of the tenancy. However, further protections are needed in the Bill to ensure charges for defaulting are only for fair terms in a tenancy agreement and only represent the actual cost of the default.
7. The government has already tightened the wording in the Bill to state that a default payment can only cover the landlord's loss, which is welcome. However, this definition needs to be tightened further as it is unclear what can reasonably be included as part of a landlord's loss. For example, if a tenant loses a key, then a tenant should pay for the new key, but should not be charged additional costs on top of this which should be considered part of a landlord's business costs (such as paying for a landlord's time in replacing the new key).
8. Further clarity is also needed on what it is reasonable to charge if a landlord pays a letting agent to deal with any default, as it is unclear how this fits with a landlord's loss. For example, if a letting agent charges a landlord considerably more than the actual cost of the default, then the landlord's loss would be far higher than the true cost of the default.

¹ YouGov survey of 3,978 private renters in England, online, weighted, Jul-Aug 2017

² Shelter, [Lessons from the Scottish Lettings Market](#), June 2014

9. There also need to be more protections to ensure that tenants are only charged for defaults where the term of the agreement that gives rise to the alleged default, is itself a fair contract term. Ensuring charges are included in the tenancy agreement at the outset does not offer much protection to a tenant as it is likely to be difficult for a tenant to identify these charges within a tenancy agreement. Tenants are also not well-placed to challenge landlords or agents over the content of a tenancy agreement, when negotiating a tenancy, as there is an inequality of bargaining power - in an overheated rental market, prospective tenants are easily replaceable with other tenants. Furthermore, the unfair terms legislation in the Consumer Rights Act 2015 is unlikely to meaningfully protect tenants, as only a court can rule that a term of a tenancy agreement is unfair and tenants are unlikely to go to court to challenge the terms of their tenancy agreement.
10. When a landlord or agent tries to charge a tenant for a default, it is likely to be difficult for a tenant to challenge these charges. This is particularly the case during a tenancy, as many tenants will worry about challenging unfair fees, for fear of retaliatory eviction or rent increases.
11. At the end of a tenancy, there is some limited arbitration provided through the tenancy deposit schemes, if the payment for an alleged default is being claimed against a deposit. However, the arbitrator cannot rule that a contract term is unfair, so they may be reluctant to disallow unfair charges that are set out in the tenancy agreement (e.g. a charge for each letter to chase late rent). The current text of the Bill would also make it difficult for the arbitrator to disallow any charges which the landlord is claiming represents their loss, even if these are out of all proportion to the default. For example, a tenancy agreement may include an obligation for a property to be cleaned to a professional standard at the end of the tenancy. If one small part of the property is not cleaned to what the landlord deems is the required standard, the landlord may choose to get in professional cleaners for the whole property and seek to charge the tenant for this. The landlord would claim that the bill for professional cleaning is their actual loss and provided they could evidence that the tenant has not cleaned part of the property to the required standard, the arbitrator is unlikely to disallow this charge, based on the current wording in the Bill. Therefore, a tenant could face a charge of several hundred pounds for a minor default (e.g. leaving a few cobwebs or failing to clean inside a washing machine drawer).
12. Without more protections in relation to the use of default payments, landlords and agents could potentially undermine the Bill by adding unreasonable terms to tenancy agreements and charging tenants an extortionate amount for defaulting on them. Concerns over the potential for default fees to be exploited was highlighted throughout the pre-legislative scrutiny process. The HCLG Committee highlighted how default fees are open to abuse and expressed particular concerns that some agents, in their written evidence, have already said that they will severely increase default fees and apply them more vigorously to make up for the loss of other fees.³
13. The government has said it intends to produce guidance on default fees, setting out the type of default fees allowed and what it is reasonable to charge. However, guidance is not binding, and in Shelter's experience it can all too easily be ignored and will not be

³ HCLG Committee, Pre-Legislative Scrutiny of the Draft Tenant Fees Bill, Page 27

sufficient to prevent landlords and agents from adding unfair terms into tenancy agreements and charging unreasonable amounts. The Chair of the HCLG Committee, Clive Betts MP, also pointed out in the second reading that the guidance will not be available to the House of Commons as the Select Committee suggested; it will not be available until consideration in the House of Lords and therefore MPs are taking the Government's word that they are going to toughen the default fees powers without seeing that in practice.⁴

14. The Government has also said Trading Standards will enforce default fees. Shelter has concerns over how effectively Trading Standards will be able to police the use of default payments. The Committee may wish to explore whether local authorities will have sufficient powers and resources to evaluate whether a default fee genuinely represents a landlord's loss and what kind of guidance the Government propose to provide in order to assist authorities in making these determinations.
15. In light of the lack of clarity over what it would be considered reasonable to charge for a default, and the potential for some agents and landlords to try to abuse default payments, Shelter recommends a number of amendments to Schedule 1, Paragraph 4 in order to:
 - a) Tighten the definition of "payments in the event of a default", to ensure charges can only cover the reasonable and proportionate valuation of the loss to a landlord or letting agent.
 - b) Place a duty on the Secretary of State to set out in regulations, when a default payment can be charged. This will be stronger than non-statutory guidance and less likely to be ignored.
 - c) Place a duty on the Secretary of State to set out in regulations a requirement on landlords and agents to produce evidence of their loss to a tenant, when charging them for a default. This will make it easier for a tenant to assess if a charge looks fair and seek advice about challenging unfair charges.

Proposed amendment to Schedule 1, Paragraph 4

4 (1) Subject to sub-paragraphs (3), (4) and (5), a payment that a tenant is required to make in the event of a default by the tenant is a permitted payment if the tenant is required by the tenancy agreement to make the payment in the event of such a default.

(2) In this paragraph "default" means a failure by the tenant to—

- (a) perform an obligation, or
- (b) discharge a liability,

arising under or in connection with the tenancy

(3) But if the amount of the payment exceeds the reasonable and proportionate value of the loss suffered by the landlord or letting agent as a result of the default, the amount of the excess is a prohibited payment.

(4) The Secretary of State must by regulations made by statutory instrument specify the circumstances in which a payment is to be considered a payment in the event of a default

⁴ [Hansard](#), Tenant Fees Bill, Second Reading

within the meaning of sub-paragraph (1).

(5) Regulations under sub-paragraph (4) must also make provision as to the procedure to be followed by a landlord or letting agent in seeking to recover a payment under this paragraph, which may include a requirement to give notice of proposed recovery in a prescribed form accompanied by evidence of the loss sustained by reason of the relevant default.

Recommendation 3: Add in more protections to prevent any confusion or abuse over the returning of holding deposits

16. Shelter has concerns that the terms around the refunding of holding deposits are open to confusion and potentially abuse. The Bill allows a landlord or letting agent to not refund a holding deposit if a tenant has provided false and misleading information, which materially affects their ability to rent the property. However, there is currently a lack of clarity over what would be considered false and misleading information.
17. The scope for confusion was highlighted by the HCLG Committee, who recommended that a tenant should only lose their holding deposit if they have “knowingly” given false and misleading information. The government chose not to accept this recommendation on the basis that it would be too difficult for a landlord or agent to evidence whether a tenant gave the information knowingly.
18. As holding deposits are often handed over quickly, in a rush to secure a property, they are particularly vulnerable to fraud or tenants being misled about whether or when the money will be returned, and one week’s rent (an average of £192 across England or £309 in London) is a significant amount of money for tenants to lose. Shelter is particularly concerned that those on low incomes or in insecure employment may be especially vulnerable to unfairly losing their holding deposit. For example, it may be difficult for them to provide exact details of their income in the form being asked for by the agent, so that they could easily be accused of having provided false and misleading information.
19. Therefore, Shelter strongly recommends that further protections are added to the Bill to ensure that tenants are provided upfront with information about how their holding deposit will be treated and if it is not being refunded, evidence of the landlord’s or agent’s ground for not refunding it. This will make it possible for tenants to challenge if their holding deposit is being withheld unfairly.
20. As set out in the box below, Shelter recommends that a regulatory power is added to the Bill, through which the government can set out clear requirements about the information a landlord or agent should provide to a tenant about their holding deposit. In particular:
 - a) When accepting a holding deposit, landlords or agents should be required to set out in writing the circumstances in which it will be returned.
 - b) When not refunding the holding deposit, the landlord or agent should set out in writing evidence of their grounds for this, including details of any information they believe was false or misleading. It is suggested that this correspondence should include

a link to any non-statutory guidance the government produces on holding deposits, so that tenants can easily check if the decision is justified.

Suggested amendment to Clause 5

5 Treatment of holding deposit

Schedule 2 makes provision about the treatment of holding deposits and for regulations concerning the procedures to be followed in relation thereto.

Suggested amendment to Schedule 2:

Requirement to repay holding deposit:

3 (d) in any other case, the landlord or letting agent fails to follow the procedure set out in regulations made under paragraphs 12 or 13.

4 (d) where paragraph 3(d) applies, the deadline for agreement.

Exceptions:

5 Paragraph 3(a) does not apply if or to the extent that the amount of the deposit is applied, with the consent of the relevant person -

Requirement to provide information to a tenant with regard to a holding deposit

12. The Secretary of State must by regulations made by statutory instrument make provision as to the procedure to be followed by a landlord or letting agent when receiving a holding deposit, which shall include a requirement to provide notification to the relevant person in a prescribed form concerning the treatment of the holding deposit.

13. Regulations under paragraph 12 must also make provision as to the procedure to be followed by a landlord or letting agent in relation to a decision not to repay a holding deposit on one of the grounds specified in paragraphs 7 to 11, which shall include a requirement to give notice in a prescribed form within a specified period, accompanied by evidence of the relevant ground.

Recommendation 4: Reconsider the HCLG Committee's recommendation to cap holding deposits at 5 weeks' rent

21. Shelter feels the Government has missed an opportunity to improve the affordability of private renting, by rowing back on its initial promise to cap security deposits at 4 weeks' rent and subsequently by choosing not to accept the HCLG Committee's recommendation to cap holding deposits at 5 weeks' rent.

22. Paying a security deposit upfront significantly adds to the costs which tenants must budget for when moving home. For those on low incomes, without savings or the ability to borrow from family or friends, sometimes these costs can be an insurmountable barrier to securing a new home, resulting in homelessness.⁵ The introduction of a cap is therefore very welcome.
23. However capping deposits at 6-weeks will mean some renters in England still have to find up to an average of over £1100 (or over £1800 in London) to put down a deposit.⁶ Additionally, in Shelter's most recent survey, the majority of landlords (55%) already only ask for one month's rent as a deposit, with only 6% asking for more than six weeks.⁷ Therefore a six-week cap is likely to have limited impact in practice.
24. Landlords have argued the cap needs to be greater than one-month's rent because otherwise tenants may substitute their last month's rent for the deposit. Our research suggests this does not happen often in practice: in our most recent landlords' survey, only 18% of landlords had experienced this in the last 5 years and less than half of them had experienced a tenant doing this without asking.⁸ Shelter has observed that this practice has decreased in recent years, due to the introduction of deposit protection legislation.
25. In light of this Shelter would encourage the Bill Committee to reconsider the HCLG Committee's recommendation to cap deposits at 5 weeks' rent, as this would be more affordable, whilst not exposing landlords to unnecessary risks.

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⁵ Shelter, Shut Out, June 2017

⁶ [English Housing Survey, Headline Report](#), 2016-17, average weekly rents

⁷ YouGov survey of 1137 private landlords, online, weighted, Jul-Aug 2017

⁸ YouGov survey of 1137 private landlords, online, weighted, Jul-Aug 2017